Highlands District Community Association v. British Columbia (Attorney General), 2021 BCCA 232 (CanLII)

Date:	2021-06-14
File number:	CA47150
Citation:	Highlands District Community Association v. British Columbia (Attorney General), 2021 BCCA 232 (CanLII), <https://canlii.ca/t/jgddx>, retrieved on 2022-07-22

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Highlands District Community Association v. British Columbia (Attorney General),* 2021 BCCA 232

Date: 20210614
Docket: CA47150

Between:

Highlands District Community Association

Appellant
(Petitioner)

And

The Attorney General for British Columbia, The Minister of Mines, Energy & Petroleum Resources, Chief Inspector of Mines, and O.K. Industries Ltd.

Respondents
(Respondents)

Corrected Judgment: The text of the judgment was corrected on the cover page on June 16, 2021.

Before: The Honourable Madam Justice MacKenzie
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated November 6, 2020 (*Highlands District Community Association v. British Columbia (Attorney General)*, 2020 BCSC 2135, Vancouver Docket S205990).

Counsel for the Appellant (via videoconference):	I.M. Knapp E. Campbell, Articled Student
Counsel for the Respondents, The Attorney General of British Columbia, The Minister of Mines, Energy & Petroleum Resources, and Chief Inspector of Mines (via videoconference):	J. Patrick L. Lee
Counsel for the Respondent, O.K. Industries Ltd. (via videoconference):	B.T. Duong M.S. Oulton S. Penney
Place and Date of Hearing:	Vancouver, British Columbia May 5, 2021
Place and Date of Judgment:	Vancouver, British Columbia June 14, 2021

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Butler

Summary:

Appeal from the dismissal of an application for judicial review of a Mines Inspector's decision to issue a permit to operate a rock quarry. The only issue is whether the decision was unreasonable because the Mines Inspector failed to consider the climate change impacts of the proposed quarry. The Mines Inspector did not consider climate change relevant under the Mines Act. The reviewing judge held that the Mines Inspector had the discretion to consider the impacts of climate change but his failure to do so did not render his decision unreasonable. The appellant contends that climate change is such an important issue that the Mines Inspector's failure to consider it constituted a fettering of his discretion, resulting in an unreasonable decision. Held: Appeal dismissed. While the Mines Inspector's statement of relevance was overly broad, his interpretation of the factors he is required to consider under the statutory scheme was reasonable. The broad discretion granted to the decision maker under the Mines Act imposes no mandatory requirements and the Mines Inspector provided extensive reasons in which he assessed the factors he considered relevant to the application before him. Although the Mines Inspector could have requested information about climate change impacts, his failure to do so did not render his decision unreasonable.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] The appellant, Highlands District Community Association (HDCA), appeals the dismissal of an application for judicial review of a decision of a Mines Inspector issuing a permit to the respondent, O.K. Industries Ltd. (OKI), to operate a rock quarry. The only issue on appeal is whether the decision was unreasonable because the Mines Inspector failed to consider the climate change impacts of the proposed quarry.

Background facts

[2] The District of Highlands is a semi-rural and industrial community with approximately 2,200 residents, located in the Capital Regional District northwest of Victoria. HDCA is a society with approximately 135 members that purports to represent the interests of the residents of the Highlands.

[3] OKI is engaged in the business of industrial quarrying and road paving on Vancouver Island. In 2015, it purchased 66 acres of vacant, unimproved land in the District of Highlands with the intention of establishing a rock quarry. The land is adjacent to industrial, residential and commercial properties, as well as Thetis Regional Park. It is not zoned for industrial or commercial use but it is designated as "Commercial Industrial" in the District of Highlands Official Community Plan.

[4] In 2016, OKI unsuccessfully applied to the District of Highlands to rezone the lands. On March 20, 2017, OKI applied to the Minister of Mines, Energy and Petroleum Resources for a permit to operate a rock quarry.

[5] Mine permits are governed by the *Mines Act*, R.S.B.C. 1996, c. 293 [the *Mines Act* or the *Act*] and the *Health and Safety Reclamation Code for Mines in British Columbia*, established under s. 34 of the *Act* [the *Code*]. The application process commences with the submission of a Notice of Work, publication of the Notice, and referral to a Mines Inspector for consideration. The Mines Inspector receives input from interested stakeholders in addition to various reports from the applicant, including reports on environmental impacts of the proposed quarry.

[6] The application process in this case took time. OKI commissioned several environmental assessments that were eventually compiled into an environmental effects and mitigation report on March 22, 2019. This report, prepared by Hemmera Envirochem Inc., was shared with HDCA on April 8, 2019.

[7] There was significant opposition to the rock quarry from HDCA, the District of Highlands, and the Capital Regional District. Several petitions were submitted and letters were written to the Premier and members of the Provincial Cabinet voicing opposition.

[8] On March 18, 2020, a Senior Mines Inspector granted OKI a permit to allow operation of the rock quarry. The permit incorporated several parts of the Hemmera environmental report, and contained numerous conditions related to environmental protection, including management and site monitoring of surface and ground water; plans for excavation, drilling and blasting; hydrocarbon transport, storage and handling, and spill responses; management of ecology and wildlife; and reclamation. The permit was accompanied by extensive reasons for the decision.

[9] In his reasons, the Senior Mines Inspector described his legislative authority under the *Mines Act* and the *Code*, OKI's property and the surrounding lands, the proposed quarry activities, and the application process, including consultation and public review. He set out the main concerns and issues raised and his consideration of each. He noted HDCA's concerns included impacts on air and water quality (groundwater), old growth tree specimens, wildlife corridors, endangered species, and the neighbouring contaminated site (Millstream Meadows), as well as impacts on neighbouring land use, property values and quality of life. The Mines Inspector addressed these and other issues in considerable detail, and summarized what he considered the most important concerns, issues and potential impacts related to the proposed quarry. With respect to climate change, he stated:

> … Another issue raised was the impact of carbon emissions related to a quarry at this location and the impacts on global climate change. While this is an important issue and Canada has passed a non-binding motion to declare a national climate emergency in Canada, climate change is not relevant under the *Mines Act*.

[10] The Inspector acknowledged the considerable opposition to the quarry as expressed in the petitions, but considered that there were no health, safety, economic or environmental grounds to deny a permit and was satisfied that the most relevant concerns about impact had been adequately addressed. He further stated:

> In consideration of all of the above, I find I cannot reasonably refuse to issue a *Mines Act* permit for the Application based solely on public opposition, without science-based technical evidence that indicates my considerations have left out critical, credible and reliable information and undisputable facts.
>
> I have been open to receiving and reviewing relevant and well-founded science-based information. I have reviewed the comments and opinions, the historic and current scientific investigations at Millstream Meadows, the information, science-based evidence and interpretations provided by qualified professionals. I have not been presented with science-based information or interpretation that refutes what has been made available to me.

[11] He therefore concluded that he had sufficient information on which to base his decision to issue the permit to OKI.

The judicial review

[12] HDCA's petition challenged the Mines Inspector's decision on grounds of procedural fairness and unreasonableness. The chambers judge rejected HDCA's arguments on both grounds. This appeal concerns only the second ground.

[13] There was no dispute that the correct standard of review of the Mines Inspector's decision is reasonableness, as applied in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[14] It was HDCA's submission that the Mines Inspector's conclusion that the impacts of climate change were beyond the scope of the *Mines Act*, constituted an improper fettering of his discretion, and rendered the decision to issue a permit unreasonable.

[15] The chambers judge assessed the reasonableness of the Mines Inspector's decision in accordance with the principles expressed at paras. 100–101 of *Vavilov* and held that the issue was whether the decision was untenable in light of the relevant factual and legal constraints. He considered the governing statutory scheme, Canada's international commitments on climate change, the evidence before the Mines Inspector, and the impact of the decision on HDCA.

[16] With respect to the statutory scheme, the judge noted that neither the *Mines Act* nor the *Code* refer to climate change but do refer to the environmental impacts of mining. More specifically, s. 10 of the *Act* requires applicants to include plans for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine, and authorizes the Mines Inspector to include permitting terms regarding environmental protection and reclamation. The judge also noted that only larger rock quarries (with an annual production capacity of 250,000 tonnes or more) are subject to the more expansive environmental assessment under the *Environmental Assessment Act*, S.B.C. 2018, c. 51 [the *EAA*], which includes consideration of greenhouse gas emissions. The judge concluded that the governing statutory scheme as set out in the *Mines Act*, the *Code* and the *EAA* does not make consideration of the impacts of climate change a requirement for approving a permit for a smaller scale rock quarry such as the quarry in issue in this case.

[17] The judge also concluded that Canada's international commitments to reduce carbon emissions do not go so far as to mandate consideration of climate change impacts for every industrial project, regardless of scope, and it was within the purview of the legislature to require climate change to be considered for some projects and not for others.

[18] The judge further concluded that the Mines Inspector could not be said to have failed to consider evidence of climate change impacts or how the members of HDCA would experience such impacts, as there was no evidence put before him relevant to these issues. He accepted that there may be climate change impacts from the development of the rock quarry, as there would be for any industrial project, but HDCA failed to provide information on how its members would experience climate change impacts relative to the entire population.

[19] The chambers judge therefore concluded:

> [111] Having reviewed the Mines Inspector's reasons for issuance of the permit it is apparent that he considered environmental effects of the rock quarry project and included relevant provisions in the Permit conditions.
>
> [112] I agree with the submission of HDCA that the Mines' Inspector had a broad discretion to consider the impact of climate change in his evaluation of the environmental impacts of the proposed rock quarry. I do not consider that in the scheme established by the [*Mines*] *Act* and the *Code* that this consideration was of central significance for a rock quarry of the size proposed to be constructed and operated by OKI.
>
> [113] Climate change is not a consideration that went "straight to the heart" of the decision whether to grant the Permit. The alleged failure to consider climate change did not constitute an improper fettering of the Mines' Inspector's discretion making the decision to issue the Permit unreasonable.
>
> [114] In conclusion, I do not consider that the Mines Inspector's decision not to consider climate change constitutes a sufficiently serious shortcoming that it can be said that it did not exhibit the requisite degree of jurisdiction [*sic*], intelligibility and transparency.

On appeal

[20] The issue raised by HDCA in this appeal is whether the failure of the Mines Inspector to consider the climate change impacts of the proposed project rendered the decision to grant the permit unreasonable.

[21] HDCA submits that the Mines Inspector's failure to investigate and consider climate change impacts constituted a failure to discharge his duty to conduct a thorough assessment of the environmental impact of the project, thereby fettering his discretion and rendering his decision unreasonable.

[22] The respondent OKI submits that there is no basis to find that the Mines Inspector fettered his discretion, as he considered the environmental impacts of the rock quarry within the scope of the legislative scheme, nor is there a basis to find the decision unreasonable within the meaning of *Vavilov*.

[23] The respondent, the Chief Inspector of Mines, takes no position on the merits of the appeal but makes submissions on the statutory scheme of the *Mines Act*, the *Code*, and other environmental legislation.

The standard of review

[24] There is no controversy that on an appeal from a decision on a judicial review, the court is to assess whether the judge identified the correct standard of review and applied it correctly. This court effectively steps into the shoes of the lower court and focuses on the administrative decision under review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 46–7; see also *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at para. 48. There are, however, some circumstances where deference is owed to a reviewing judge, such as in those rare circumstances where they are required to make findings of fact: *Fraser Mills Properties Ltd. v. Coquitlam (City)*, 2018 BCCA 328 at para. 12; *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at para. 77.

[25] There is also no controversy that the appropriate standard of review of the Mines Inspector's decision is reasonableness within the principles in *Vavilov*. HDCA contends that the Mines Inspector's decision is unreasonable, not because of a failure in the reasoning process, but because it is "untenable in light of the relevant factual and legal constraints that bear on it": see *Vavilov* at para. 101. HDCA acknowledges that the chambers judge correctly identified this as the issue but says that he erred in its application.

Legal principles — reasonableness review

[26] Although HDCA does not challenge the Mines Inspector's reasoning process, the reasons remain important in conducting a reasonableness review. As the majority stated in *Vavilov*, a consideration of reasons is the starting point for the analysis, as the reviewing court must consider both the rationale for the decision and its outcome:

> [84] … A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion…
>
> [85] … a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and the law that constrain the decision maker…

[27] It is common ground that the reasonableness review in this case should be focused on the fundamental principles expressed in *Vavilov* at paras. 100–101:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.
>
> [101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

[28] It is also common ground that the reviewing court is to take into account a broad range of elements in assessing whether a decision is justified "in light of the relevant factual and legal constraints that bear on it". These include the governing statutory scheme, other statutory or common law, the principles of statutory interpretation, the evidence before the decision maker, the submissions of the parties, past practices and decisions, and the impact of the decision on the affected individuals: *Vavilov* at paras. 106–135.

[29] Where there is a question of statutory interpretation, the "modern principle" applies—that is, the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 21; *Vavilov* at para. 117. A decision maker's interpretation of a statutory provision must comply with "the rationale and purview of the statutory scheme" or "be consistent with the text, context and purpose of the provision": *Vavilov* at paras. 108, 120. A failure to consider an aspect of the text, context or purpose may render an interpretation unreasonable where such aspect is key and it is clear that had it been considered, the result would have been different: *Vavilov* at para. 122. However, under a reasonableness review, the reviewing court is not to undertake a *de novo* analysis or measure the decision maker's interpretation against the one the court would have reached. Even where there is a single reasonable interpretation, "a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker": *Vavilov* at paras. 116, 124.

[30] Finally, where the decision maker does not explicitly provide reasons for interpreting a statutory provision, the reviewing court may be able to discern the rationale from the record, including the reasons provided, if any. Where the basis for the decision remains unclear, the court's review will inevitably focus more on the outcome than the reasoning process: *Vavilov* at paras. 123, 137–138.

[31] See also *Yu v. Richmond (City)*, 2021 BCCA 226 at para. 55, where Justice MacKenzie provides a succinct summary of these *Vavilov* principles.

Analysis

[32] HDCA grounds its submission on the fettering of discretion. It submits that the Mines Inspector was required to gather the necessary information and determine the impact of the proposed project on climate change, and by failing to do so he unduly narrowed the scope of his discretion under the *Mines Act*.

[33] The respondent OKI submits that the Mines Inspector's interpretation of the *Mines Act* was reasonable, and even if climate change is a relevant factor, the *Act* does not require him to consider this, nor does his failure to do so render the decision unreasonable.

[34] It is my view that HDCA's submission fails to recognize the proper scope of the Mines Inspector's authority within the statutory scheme, and inappropriately asks this court to direct the Inspector to consider a specific issue that is not required in the applicable legislation. For the reasons that follow, I would dismiss the appeal.

1. The statutory scheme and the relevance of climate change

[35] Although the Mines Inspector provided extensive reasons for his decision to grant the permit, he did not do so in respect of his conclusion that climate change is not relevant under the *Mines Act*. However, a review of the reasons as a whole does reveal the rationale for his conclusion.

[36] At the outset of his reasons, the Mines Inspector described his statutory authority under s. 10 of the *Mines Act* and Part 10.1.1 of the *Code*:

> Pursuant to section 10(1) of the *Mines Act* … before starting any work in, on, or about a mine, the owner, agent manager or any other person must hold a permit for that work issued by the chief inspector of mines, unless exempted in writing by the chief inspector. The application for a permit must include a plan outlining the details of the proposed work and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine, including the information, particulars and maps required by the regulations or [the *Code*].
>
> Pursuant to section 10.1.1 of the Code, the proposed mine plan and reclamation program filed with the inspector for compliance with section 10(1) of the *Mines Act*, shall consist of the appropriate Notice of Work forms together with such other information as the inspector may require, for approval of placer mining, sand and gravel pits, rock quarries and industrial mineral quarries.

[37] The Mines Inspector's conclusion about climate change followed an extensive discussion of what he considered to be 12 key issues and concerns raised throughout the application process. Before summarizing these issues and how they could be addressed, he explained:

> I have considered and weighed what I understand to be all relevant information on this file and have conducted a thorough and comprehensive review based on the requirements of the *Mines Act* … I note that local government bylaws, regulations, land use issues, and other provincial and federal legislation are not within my jurisdiction to address or comment on in making permit decisions under the *Mines Act*.
>
> Operators of mines are required to comply with the *Mines Act*, the Code and the permit, in addition to other legislation and regulations, including local bylaws, that may apply. Some of the concerns noted above will be addressed to some degree by the *Mines Act* and the Code, while those that do not may be addressed by other legislation, regulation and bylaws. I have included permit conditions that I believe will address the concerns and issues I have heard in the course of my review of this application.

[38] Under the heading "Other concerns of impacts from the Quarry", the Mines Inspector addressed (1) climate change and (2) the petitions received in opposition to the project. It is in this context that he made the following impugned statement:

> I have summarized in this document what I consider to be the most important concerns, issues and potential impacts related to the proposed quarry. Another issue raised was the impact of carbon emissions related to the quarry at this location and the impacts on global climate change. While this is an important issue and Canada has passed a non-binding motion to declare a national climate emergency in Canada, climate change is not relevant under the *Mines Act*.

[39] It is not clear whether the latter conclusion was intended to refer to "carbon emissions related to the quarry" or to "the impacts on global climate change", or to both. However, when the reasons are read as a whole, it is clear that this conclusion was intended to relate to the Mines Inspector's express authority under the *Mines Act* and the *Code*, and was rendered in the context of the issues considered to be the most important in relation to the information gathered for the application.

[40] Although I consider the bald statement, "climate change is not relevant under the *Mines Act*" to be overly broad, I do not consider the Mines Inspector's approach to his authority to address climate change to be unreasonable. His stated understanding of the statutory scheme under which he exercised his authority is accurately reflected in s. 10 of the *Mines Act*, the purposes of the *Code*, and more particularly Part 10 of the *Code*. The *Act* gives the Mines Inspector broad discretion to determine what information is required and whether an application is "satisfactory", but environmental issues are not broadly defined, make no reference to climate change or greenhouse gas emissions, and focus on the protection and reclamation of land, watercourses and cultural heritage resources:

> 10 (1) Before starting any work in, on or about a mine, the owner, agent, manager or any other person must hold a permit issued by the chief permitting officer[1] and, as part of the application for the permit, there must be filed with an inspector a plan outlining the details of the proposed work <u>and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine</u>, including the information, particulars and maps established by the regulations or the code.
>
> …
>
> (3) If the chief permitting officer considers the application for a permit is satisfactory and if the applicant has complied with the regulations, if any, made under section 38 (2) (l) respecting applications for permits, the chief permitting officer may issue the permit, and the permit may contain conditions that the chief permitting officer considers necessary.
>
> (4) The chief permitting officer may, as a condition of issuing a permit under subsection (3), require that the owner, agent, manager or permittee give security in the amount and form, and subject to conditions, specified by the chief permitting officer
>
> (a) for mine reclamation, and
>
> (b) <u>to provide for protection of, and mitigation of damage to, watercourses and cultural heritage resources affected by the mine</u>.
>
> [Emphasis added.]

[41] The purposes of the *Code* include protecting and reclaiming "the land and watercourses affected by mining" and monitoring the extraction of mineral resources and ensuring "maximum extraction with a minimum of environmental disturbance, taking into account sound engineering practice and prevailing economic conditions". Part 10 of the *Code* addresses permitting and reclamation requirements that include programs for environmental protection of land and watercourses during the construction and operation of a mine but there are few mandatory requirements for quarries.

[42] The chambers judge considered the *Mines Act* and the *Code* in a broader statutory context that included the provisions in the *EAA* applicable to the development of large rock quarries. In my view, this was entirely appropriate, consistent with the modern approach to statutory interpretation that considers the interplay between statutes that address the same subjects. As described in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014) at 416–417:

> Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject …
>
> The provisions of related legislation are read in the context of the others and the presumption of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act.

[43] These principles were applied by this court in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2016 BCCA 432 at para. 60.

[44] Under the *EAA*, environmental assessments are broadly based and must consider numerous matters, including "greenhouse gas emissions" and "the potential effects on the province being able to meet its targets under the *Greenhouse Gas Reduction Targets Act*"[2] (s. 25(2)(h)). These assessments are required only for "reviewable projects", defined in the *Reviewable Projects Regulation*, B.C. Reg. 243/2019. For mine projects, only larger quarries (with a production capacity of greater than 250,000 tonnes per year of product) are reviewable under the *EAA*.

[45] Additionally, there are other statutes that expressly address climate change by establishing targets and creating financial incentives to reduce emissions: the *Climate Change Accountability Act*, S.B.C. 2007, c. 42 imposes provincial targets for the reduction of greenhouse gas emissions; the *Greenhouse Gas Industrial Reporting and Control Act*, S.B.C. 2014, c. 29 requires certain industrial operations to report on greenhouse gas emissions; the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirement) Act*, S.B.C. 2008, c. 16 creates a carbon credit system for suppliers of low carbon energy resources; and the *Carbon Tax Act*, S.B.C. 2008, c. 40 makes carbon intensive energy sources more expensive.

[46] In this broader context, the environmental protections to be considered in the permitting process under the *Mines Act* and the *Code* are narrower than those to be considered under the *EAA*. The quarry in issue in this appeal proposes a maximum annual production of 150,000 tonnes and is therefore not a reviewable project subject to assessment under the *EAA*. The Mines Inspector has a broad discretion under a scheme that imposes no mandatory requirements, in contrast to the *EAA*. The legislature has chosen to expressly address concerns about greenhouse gas emissions and global climate change in the *EAA* and the other legislation referred to above, and has imposed no requirement to consider these broader issues in the permitting process under the *Mines Act* and the *Code*.

[47] Therefore, despite his overly broad language regarding the relevance of climate change, it is my view that the Mines Inspector's interpretation of the factors he is required to consider in an application for a permit under s. 10 of the *Mines Act* was reasonable. He exercised his discretion in compliance with the language, rationale, and purview of the applicable statutory scheme.

2. Reasonableness

[48] All that said, both HDCA and OKI agree that the Mines Inspector could have addressed climate change issues if he considered them relevant to the proposed quarry, given his broad statutory discretion. The chambers judge was of the same view but did not consider this issue to be "of central significance" due to the size of the project. Nor did he consider the Mines Inspector's failure to address it to constitute an improper fettering of discretion: at paras. 112–113.

[49] HDCA submits that the broad discretion granted to the Mines Inspector under s. 10 of the *Mines Act* mandates consideration of *all* potential environmental impacts. It contends that climate change is a fundamentally important component of an assessment of environmental impacts and the Mines Inspector was required to investigate this and consider it. It further contends that his failure to do so undermines the entire decision. HDCA asks this court to direct that such a significant environmental issue be considered.

[50] There are several problems with this submission. First, as discussed above, the statutory scheme is focused on the protection and reclamation of the land, watercourses and cultural heritage resources affected by a mine and does not impose mandatory consideration of any specific matter. Second, the broad discretion granted under s. 10 of the *Mines Act* mandates consideration of the potential environmental impacts the Mines Inspector considers relevant in each particular case. In such circumstances, it is not the role of this court to direct a statutory decision maker to consider a specific issue.

[51] Moreover, HDCA's submission is inconsistent with its own acknowledgement that a Mines Inspector is tasked with conducting "a summary environmental assessment" in a process that is "plainly less rigid than a formal environmental assessment", and where the Inspector "must nonetheless ascertain the relevant and pertinent environmental impacts of a proposed project".

[52] HDCA also relies on Canada's international commitments to reduce carbon emissions in the *United Nations Framework Convention on Climate Change* and the *Paris Agreement*, submitting that such commitments inform the interpretation of statutes absent express legislative guidance to the contrary and supports an interpretation of the *Mines Act* that reflects the importance of these commitments. To support this submission, HDCA refers to *Earthlife Africa Johannesburg v. Minister of Environmental Affairs*, [2017] 2 All S.A. 519 (GP), where the court viewed these international commitments as requiring climate change impacts to be considered in a context it says is similar to that in this case.

[53] In *Vavilov*, the court acknowledged that in some administrative decision-making contexts, international law may operate as an important constraint on a decision maker: at para. 114. It also acknowledged a principle of statutory interpretation that legislation is presumed to operate in conformity with Canada's international obligations, as discussed in *R. v. Hape*, 2007 SCC 26 at para. 53:

> … It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result…

[54] Whether and how international commitments may influence the interpretation of statutory authority is fact and context specific. In *Earthlife*, the context was considerably different from this case, as it involved the authorization of a coal-fired power station under environmental assessment legislation similar in scope to the *EAA*, where climate change had been acknowledged to be a relevant factor in a Ministerial appeal decision.

[55] Notably, HDCA does not suggest that the statutory scheme as interpreted and applied by the Mines Inspector would put Canada in breach of its international obligations. Nor does it suggest that these treaties have any direct effect by having been implemented domestically by statute or containing provisions expressing a rule of customary international law or peremptory norm. In the context of this appeal, and given the presumption of conformity, I do not see that these international obligations operate as a significant constraint that bear on the Mines Inspector's decision or otherwise help to inform the reasonableness analysis.

[56] As the majority noted in *Vavilov* (at para. 108), where a decision maker has a broad statutory discretion, it would be unreasonable to fetter that discretion. However, fettering requires more than a failure to take a relevant factor into account. It occurs where a decision maker focuses unduly on a policy or an extraneous consideration and refuses to put his or her mind to the specific circumstances and legally relevant factors in the case, effectively failing to exercise his or her discretion: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para. 62. In my view, this is not a case where the Mines Inspector fettered his discretion. To the contrary, he exercised his discretion in accordance with his statutory mandate. While climate change is no doubt an important issue, it is not a key element in the text or purpose of the statutory scheme under the *Mines Act* and the *Code*, nor is it a key element in the context of the permitting process for a quarry of the size and scope of that in issue in this appeal.

[57] Therefore, I see no error in the chambers judge's conclusion that the Mines Inspector's failure to consider climate change did not constitute an improper fettering of discretion and was not "a sufficiently serious shortcoming" that could be said to render the decision unreasonable. The judge conducted a reasonableness review in accordance with the principles in *Vavilov*.

[58] Finally, it must be noted that this is not a case where there was evidence before the Mines Inspector on the climate change impacts of the proposed project. The chambers judge found that HDCA was aware of the opportunity to submit a technical report in the application process but did not do so. The Mines Inspector expressly stated that he had been open to receiving and reviewing "relevant and well-founded science-based information", that he had reviewed "the science-based evidence and interpretations provided by qualified professionals", and had not been presented with "science-based information or interpretation" that refuted what had been made available to him.

[59] I do not accept HDCA's suggestion that the Mines Inspector was obliged to turn his mind to the impacts on climate change by "quantifying the estimated tonnes of carbon which would be emitted through the life of the project together with the net impact of the loss of carbon sinks present on the lands". This is, in effect, a submission that the Mines Inspector is required to conduct his own investigation. In my view, the statutory scheme does not impose such an obligation on the Mines Inspector; rather it provides a broad discretion to require information he considers relevant to the matter before him. The Mines Inspector could have sought a report on carbon emissions from OKI, but his failure to do so in the context here does not render his decision unreasonable.

[60] In my view, the heart of HDCA's concern goes much deeper than the legal parameters of the Mines Inspector's authority. As it submitted:

> In assessing the magnitude of the harm, it is not sufficient to say that individual projects can be expected to make only minor contributions to climate change. While the emissions of any particular project may be small, this understates the nature of the environmental challenge at issue. Climate change is not a problem with immediate and obvious impacts. It is the result of the accumulation over decades, or even centuries, of a large number of relatively minor and innocuous contributions. The problem will not be solved as a result of any particular decision; its resolution, rather, lies through individual change at the micro-level…

[61] In my view, this is a submission that seeks a legislative response to a problem of global magnitude, but provides no basis for this court to intervene.

Conclusion

[62] For all of these reasons I would dismiss the appeal, with thanks to all counsel for their thoughtful and able submissions.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Butler"

---

[1] At the time the permit was issued in this case, the Mines Inspector was a delegate of the Chief Inspector of Mines appointed under s. 3. In amendments that came into force on August 14, 2020, the authority under s. 10 is now granted to the Chief Permitting Officer appointed under s. 8.3.
[2] Now the *Climate Change Accountability Act*, S.B.C. 2007, c. 42.